No. 10, Original

In the Supreme Court of the United States

October Term, 1954

STATE OF ARIZONA, Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants,

UNITED STATES OF AMERICA, Intervener,

STATE OF NEVADA, Intervener.

BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

HARVEY DICKERSON,
Attorney General of Nevada,

H. W. EDWARDS,
Special Counsel,

W. T. MATHEWS,
Special Assistant Attorney General of Nevada,

WILLIAM J. KANE,
Special Assistant Attorney General of Nevada,

WILLIAM N. DUNSEATH,
Deputy Attorney General of Nevada,

JOHN W. BARRETT,
Deputy Attorney General of Nevada,

DAVID GOLDWATER,
Special Assistant Attorney General of Nevada,

Counsel for State of Nevada

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BRIEF OF THE STATE OF NEVADA, INTERVENER, IN RE MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING

STATEMENT

Heretofore and after the United States and the State of Nevada were permitted to intervene in the original case, and after the cross-pleadings of the complainant, the defendants and the interveners had been filed, whereby the issues were drawn between said parties, the California defendants interposed their motion to join as additional parties the States of Colorado, New Mexico, Utah and Wyoming, each said State being a signatory to the Colorado River Compact. The main ground upon which said motion was and is predicated being that "The meaning and effect of the Colorado

River Compact are in controversy in the present "case" and that "No decree determining the meaning and effect of that Compact, considered as a contract, can be fully effective in the absence of the other four parties to it." Defendants' Motion to Join, page 2, par. I.

The States of Colorado, New Mexico, Utah and Wyoming, having filed herein their respective briefs opposing the granting of the motion to join them as parties in the case, notwithstanding the fact that each of them is a party to the Colorado River Compact, wherein most valuable rights to the beneficial consumptive use of the waters of an interstate stream were and are apportioned to the respective upper and lower basins, which said rights are interrelated and subject to be drawn in question by the issues developed by the pleadings filed herein by the original parties and the interveners.

A substantially correct summary of the issues so developed by the pleadings is contained in Exhibit A, pages 7–22, California's Motion to Join, as Parties, the States of Colorado, New Mexico, Utah and Wyoming. Nevada submits that the issues as stated in the summary thereof demonstrates that the States of New Mexico and Utah are indispensable parties, and that Colorado and Wyoming are, at least, necessary parties.

The States of New Mexico and Utah are Indispensable Parties

New Mexico and Utah, in addition to being classed as States of the Upper Basin of the Colorado River Stream System, are States of the Lower Basin, with the right accorded each of them to the beneficial consumptive use of its equitable share of the water apportioned to the Lower Basin by the Colorado River Compact. Art. II(g), Art. III(a), (b), (g), Compact: Pages 2–3, Brief, New Mexico. Utah, in its brief in opposition to California's motion, admits it has a limited right of participation in the Lower Basin waters, and attempts to avoid participation in the instant case by stating they are now negotiating with Arizona for distribution of Utah's share in such waters by Compact. Page 20, Utah's Brief.

In this connection, it is interesting to note that Article XVIII, Paragraph b, of the Upper Colorado River Basin Compact to which New Mexico and Utah are signatories, provides: "The State of New Mexico and the State of Utah reserve their respective rights and interest under the Colorado River Compact as States of the Lower Basin." Vol. II, page 75, California's Appendixes to Answer.

Nevada was given leave to intervene herein by Order of this Court entered June 1, 1954, pursuant to its motion and petition therefor, filed December 21, 1953. Upon the filing of said motion and petition, service of copies thereof was made upon the respective Attorneys General of Colorado, New Mexico, Utah and Wyoming, even though they were not parties in the case.

Nevada specifically alleged in its petition the necessity of the increasing of the beneficial consumptive use of water in the Lower Basin by one million acre-feet of water as provided and authorized in and by Article III(b) of the said Compact, and that said increase must be had by authoritative concerted action of the five Lower Basin States. See pars. Nos. VIII, X, XI, XIII, XX, XXIV. Further, in the prayer of its petition, Nevada prayed that the rights of the States of Arizona, California, Nevada, New Mexico, Utah and the United States in and to the use of the waters of the Colorado Stream System be adjudicated and forever set at rest, and also that the additional one million acre-feet of water, as provided in Article III(b) of the Compact, is water apportioned to the Lower Basin, subject to use only when all of the Lower Basin States shall have by authoritative compact or agreement increased the beneficial consumptive use in said Basin.

During the month of May, 1954, the United States, as intervener in the case, filed and submitted its Memorandum Requesting Pre-Trial Conference, based upon the ground that the basic issues in the case were far-reaching fundamental questions relating to the respective rights of the parties litigant in the Colorado River System; that from the pleadings the broad scope of the long-standing controversy was manifest. Page 2, Memorandum.

Nevada interposed its Memorandum in Reply to the Memorandum of the United States, and therein specifically pointed out the necessity of the joinder of New Mexico and Utah, as follows:

> Notwithstanding the fact that New Mexico and Utah unquestionably possess rights to the use of the waters of the Colorado River Stream System apportioned to the Lower Basin States and by reason thereof each said State is an indispensable party to this cause, neither of them has been made a party thereto nor has either petitioned the Court for leave to intervene. Nevada most respectfully suggests that unless and until New Mexico and Utah are made or become parties herein, vital issues pertaining to the apportionment of the waters to which all of the Lower Basin States are entitled under the Compact cannot be judicially fixed and determined. And Nevada has so alleged in Paragraphs XIII, XIV of the Petition of Intervention on Behalf of the State of Nevada filed herein December 21, 1953. Nevada suggests that all of the vitally necessary issues are not now sufficient, or at all, joined to warrant a pre-trial conference.

and,

> Answering Paragraph IV of the Request for Pre-Trial Conference of the United States, the State of Nevada denies that the reasons mentioned by the United States justify a pre-trial conference at this juncture of the proceeding and in this connection alleges that all the Lower Basin States are indispensable parties to this cause and until all such States are parties hereto and the issues fully joined between them and the United States, a pre-trial conference is premature. Nevada Memorandum, Pars. I, IV.

Copies of the Nevada Memorandum were served on the Attorneys General of New Mexico and Utah, notwithstanding the fact that neither of said States were parties in the case. Notice that

beyond question Nevada considered them indispensable parties with valuable rights in and to the waters apportioned to the Lower Basin States by the Colorado River Compact; rights that of necessity must be fixed and determined in order that each of the Lower Basin States would in time to come receive its equitable share of such water, without further prolonged litigation.

Neither the State of New Mexico nor Utah has answered Nevada's contention that Article III(b) water to the extent of one million acre-feet, can only be brought into the beneficial consumptive use increase in the apportionment of water to the Lower Basin so agreed to in the Colorado River Compact, unless and until all the States in the Lower Basin by compact or agreement, so determine. Certainly New Mexico and Utah are vitally interested in securing for their people every acre-foot of water possible, and having reserved their respective rights to the use of water apportioned the Lower Basin when becoming signatories to the Upper Basin Compact, they reserved valuable rights to participate in the apportionment between the Lower Basin States, not only of III(b) water, but also III(a) water.

To now object to becoming parties in the case, and pleading their rights to the beneficial consumptive use of the waters in question, can have but one ultimate result, i.e., that whatever final judgment and decree may be entered by this Court herein, without the determination of the rights of New Mexico and Utah, the door will remain open for them or either of them in years to come, to seriously question the rights of California and Nevada and even those of Arizona.

The Status of New Mexico and Utah With Respect to Waters Apportioned the Lower Basin States by the Colorado River Compact

As stated hereinbefore, the States of New Mexico and Utah in Article XVIII(c) of the Upper Colorado River Basin Compact, therein reserved their respective rights and interest under the Colorado River Compact as States of the Lower Basin. Most certainly

those rights extend to the beneficial consumptive use of a portion of the waters of the Colorado River Stream System apportioned to the Lower Basin States in and by Article III(a) and (b) of the Colorado River Compact. Arizona, the complainant herein, alleges in its Complaint that "Arizona expects to negotiate with New Mexico and Utah a compact which will define the respective rights of those States to participate as Lower Basin States in the use of Colorado River water apportioned now or hereafter to such Lower Basin." Par. XV, Arizona's Complaint. In the prayer of such Complaint Arizona prays, first, that its title to the annual beneficial consumptive use to 3,800,000 acre-feet of water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted, subject only to the rights of the States of New Mexico and Utah; second, that California be forever limited to 4,400,000 acre-feet of such apportioned water; third, that the defendants be forever enjoined from asserting against plaintiff in any manner, any claim to the waters of said River System which interferes with plaintiff's rights to the use of 3,800,000 acre-feet of water so apportioned, subject only to the right of New Mexico and Utah; fourth, that as to surplus waters, California be entitled to one-half thereof, and Arizona to the remainder, less a quantity of not to exceed one twenty-fifth of the total to the State of Nevada, less whatever rights New Mexico and Utah may have in such surplus.

It is apparent from the briefs of New Mexico and Utah, notwithstanding their express reservations in the Upper Colorado River Compact as to their rights as Lower Basin States under the Colorado River Compact, that they and each of them rely upon the alleged expectations of an Arizona Compact to satisfy their respective rights as Lower Basin States, to the beneficial consumptive use of the waters in question. In brief, relying upon a compact entered into with one Lower Basin State concerning Lower Basin water, to the exclusion of the rights of two other Lower Basin States, California and Nevada.

The aspects of the case have been most materially changed since

the intervention of the State of Nevada, so ordered June 1, 1954. Most certainly now Nevada's right to the beneficial consumptive use of Lower Basin water must be adjudicated. Nevada, as well as California, has the right to insist that the rights of New Mexico and Utah to the use of Lower Basin water, whether it be apportioned III(a), or III(b), or unapportioned surplus water, be stated, and claims therefor submitted to the Court in proper pleadings therefor.

New Mexico and Utah each have a vital interest in the subject matter in this case; an interest that cannot be settled, determined and adjudicated by a compact or agreement with one particular State; an interest that is not severable from the interest of each and all of the Lower Basin States.

The Rule With Respect to the Joinder of Necessary and Indispensable Parties

With all due respect to the authorities for and against the joinder of the States of Colorado, New Mexico, Utah and Wyoming, cited and relied upon by the respective parties for and against the motion to so join them, Nevada submits that the leading case indicating the criteria by which to determine whether or not a party is indispensable is *State of Washington vs. United States, C.C.A.9, 87 F.(2d) 421*, decided December 18, 1936, and followed with approval in *Pioche Mines Consol. Inc. vs. Fidelity-Philadelphia Trust Co., C.C.A.9, 202 F.(2d) 944*, decided March 23, 1953. The State of Washington vs. United States case concerned a suit by the United States against the Columbia River Packers Association, et al., in which the States of Washington and Oregon filed motions for leave to intervene. From a decree for plaintiff (U. S. v. Columbia River Packers Ass'n., 11 F. Supp. 675), the defendants appeal, and, from orders denying their respective motions for leave to intervene, the States of Washington and Oregon separately appeal. In course of the opinion the Court said at page 427:

> In cases where there is error in non-joinder of parties, either necessary or indispensable, the Courts have fallen

into common error by designating the error as "jurisdictional." The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from Shields v. Barrow, supra 17 How.130, 141, 15 L.Ed. 158: "As is observed by this court, in Mallow v. Hinde, 12 Wheat.(193) 198 (6 L.Ed. 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'" Citing cases.

There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determinmg that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent

party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable.

Applying the rule to the instant case, by answering the four several questions therein:

(1) Is the interest of New Mexico and Utah distinct and severable with respect to the waters apportioned to the Lower Basin?

Answer: No. The Colorado River Compact apportions no water to any individual State. Each State is entitled to its equitable share thereof upon proof of the necessity for beneficial consumptive use.

(2) In the absence of such party, can the Court render justice between the parties before it?

Answer: No. The rights to the beneficial consumptive use of the waters in question are interrelated and the final determination of any one right detracts from every other right therein to the extent determined for the one right so adjudicated.

(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

Answer: The right and interest of a party in and to the beneficial consumptive use of the waters in question are interrelated to the rights and interest of all other parties to the same waters. Any adjudication and determination of those rights and interest will injuriously affect the right and interest of the absent party.

(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

Answer: No. Litigation must come to an end. Courts certainly do not approve or sanction interminable litigation where most material issues with respect to valuable and vital rights and interests are the subject matter of the case and where an indispensable party in interest is available, any final determination of the like interest of the parties presently before the Court having an interest in a common fund, i.e., the waters the subject of the instant case,

leaving the interest of the absent party undetermined, would not be consistent at all with equity and good conscience.

Nevada respectfully submits that New Mexico and Utah are indispensable parties.

The States of Colorado and Wyoming are Necessary, If Not Indispensable, Parties

Aside from the grounds set forth in California's motion to make Colorado and Wyoming parties in the instant case, and aside from California's reasons that such States are necessary parties, Nevada submits that such States are necessary, if not, in fact, indispensable parties for the following reasons.

Notwithstanding the provisions of Section 4 (a), Boulder Canyon Project Act, pursuant to which the California Limitation Act was enacted whereby it is claimed the signatory States to the Colorado River Compact became third party beneficiaries, the Boulder Canyon Project Act in Section 4(a) provides that uses of the waters of the Colorado River for the purposes in said section set forth shall always be subject to the terms of the Colorado River Compact.

Neither Sections 4(a) of the Project Act nor the California Limitation Act contains any reference whatever to Article III(b) of the Compact. Nevada reiterates that Article III(a) of the Compact apportions to the Upper and Lower Basins respectively, in perpetuity 7,500,000 acre-feet of water per annum; that in addition to such apportionment in Paragraph (a), the Lower Basin was given the right to increase its beneficial consumptive use of such water by 1,000,000 acre-feet per annum, in Paragraph (b) of said Article.

Long ago in 1934, this Court had before it the case of *Arizona vs. California, Colorado, Nevada, New Mexico, Utah, Wyoming, the Secretary of the Interior, et al. 292 U.S.341*, where Arizona sought to enjoin the defendants from carrying out the provisions of the Colorado River Compact and/or the Boulder Canyon Project Act. Justice Brandeis delivered the opinion of the Court. With

respect to Article III(b) of the Compact, it is most apropos that the language of the Court be here quoted:

> Nor does Arizona show that article III(b) of the compact is relevant to an interpretation of section 4(a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under article III(b). But the act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the compact. The act merely places limits on California's use of waters under article III(a) and of surplus waters; and it is "such" uses which are "subject to the terms of said compact."
>
> There can be no claim that article III (b) is relevant in defining surplus waters under section 4 (a) of the act; for both Arizona and California apparently consider the waters under article III (b) as apportioned. It is true that Arizona alleges (not in the bill however but in her brief) that she "hopes to be able to show in the case hereafter to be brought" by evidence of Congressional Committee hearings and other legislative history that the failure in the statute to apportion the 1,000,000 acre-feet of waters was due to an understanding by Congress that article III (b) of the compact had already assigned these waters to Arizona; and that the limitation on California was passed in the light of this understanding. This hope, if fulfilled, would not make article III (b) relevant. The allegation is, not that Congress incorporated article III (b) into the act, it is that Congress understood that article III (b) had allotted all the waters therein to Arizona.
>
> The considerations to which Arizona calls attention do not show that there is any ambiguity in article III (b)

of the compact. Doubtless the anticipated physical sources of the waters which combine to make the total of 8,500,000 acre-feet are as Arizona contends, but neither article III (a) nor (b) deal with the waters on the basis of their source. Paragraph (a) apportions waters "from the Colorado River system," i.e., the Colorado and its tributaries, and (b) permits an additional use "of such waters." The compact makes an apportionment only between the upper and lower basin; the apportionment among the states in each basin being left to later agreement. Arizona is one of the states of the lower basin, and any waters useful to her are by that fact useful to the lower basin. But the fact that they are solely useful to Arizona, or the fact that they have been appropriated by her, does not contradict the intent clearly expressed in paragraph (b) (nor the rational character thereof) to apportion the 1,000,000 acre-feet to the states of the lower basin and not specifically to Arizona alone. It may be that, in apportioning among the states the 8,500,000 acre-feet allotted to the lower basin, Arizona's share of waters from the main stream will be affected by the fact that certain of the waters assigned to the lower basin can be used only by her; but that is a matter entirely outside the scope of the compact.

The provision of article III (b), like that of article III (a), is entirely referrable to the main intent of the compact, which was to apportion the waters as between the upper and lower basins. The effect of article III (b) (at least in the event that the lower basin puts the 8,500,000 acre-feet of water to beneficial uses) is to preclude any claim by the upper basin that any part of the 7,500,000 acre-feet released at Lee Ferry to the lower basin may be considered as "surplus" because of Arizona waters which are available to the lower basin alone.

It is submitted that there can be no question but that Article III (b) constitutes an apportionment of the waters of the Colorado Stream System to the beneficial consumptive use in and by the Lower Basin States of an additional 1,000,000 acre-feet of water per annum, and that this additional amount of water comes from the stream system as a whole, with the major portion thereof provided in and by the flow of the river in and from the Upper Basin States. Certainly it cannot be gainsaid that the Upper Basin States are not interested in whether the Lower Basin has perfected its right to have the additional 1,000,000 acre-feet of water applied to beneficial consumptive use. Such use will of necessity affect the beneficial use of waters apportioned the Upper Basin when called upon to deliver at Lee Ferry all or the major portion thereof. The III (b) water, it is submitted, cannot be deemed surplus water by any Upper or Lower Basin State. It is apportioned water, dedicated to the beneficial consumptive use in the Lower Basin States, and by reason thereof, is of such character as to be interrelated with the rights and interest of the Upper Basin States in the common fund, the waters of the Colorado River Stream System, which said interest cannot on the part of any State signatory to the Colorado River Compact, be deemed severable.

Nevada respectfully submits that Colorado and Wyoming at the very least, are necessary parties herein.

Dated: February 1, 1955.

Respectfully submitted,

HARVEY DICKERSON,
Attorney General of Nevada,
Carson City, Nevada.

H. W. EDWARDS,
Special Counsel,
Reno, Nevada.

W. T. MATHEWS,
Special Assistant Attorney General of Nevada,
Carson City, Nevada.

WILLIAM J. KANE
Special Assistant Attorney General of Nevada,
Reno, Nevada.

WILLIAM N. DUNSEATH,
Deputy Attorney General of Nevada,
Carson City, Nevada.

JOHN W. BARRETT,
Deputy Attorney General of Nevada,
Carson City, Nevada.

DAVID GOLDWATER,
Special Assistant Attorney General of Nevada,
Las Vegas, Nevada.

Counsel for State of Nevada.